for The Defense

The Training Newsletter for the
Maricopa County Public Defender's Office

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Attacking the Accommodation Syndrome

In prosecuting child molest cases, prosecutors frequently use an "expert" to talk about the Child Sexual Abuse Accommodation Syndrome (CSAAS).[1] This article discusses ways to prevent the introduction of CSAAS testimony (or to limit it to rebuttal), and suggests a cautionary instruction to prevent it from improperly tainting a jury.

CSAAS

CSAAS was first described by Dr. Roland Summit in a 1983 paper published in the International Journal of Child Abuse and Neglect.[2] Its purpose was to report observations about abused children's behavior and offer the syndrome as a therapeutic tool for treatment. Its intent was to assist non-abusive adults to understand responses of children being sexually exploited by other adults.

The syndrome is composed of five categories of behavior. The categories describe basic child responses and those contingent upon sexual exploitation. Stage one is secrecy, an element inherent in adult-child relationships, where a child understands certain things should not be disclosed. Stage two is helplessness, the absence of power a child has in a relationship with a parental figure or trusted adult. The first two stages are present in every child and establish a child's potential to become a victim. Stages three through five occur as the result of sexual exploitation. Entrapment and accommodation, the third stage, occurs after a child fails to get protection. Stage four, delayed disclosure, occurs when a child tells someone about the incident. Stage five, retraction, is when a child denies that the incident occurred.

In a trial context, the problem with CSAAS is simply that it assumes that a child is a victim and that abuse or molestation has occurred.

Attacking CSAAS

1. Does CSAAS Meet The Frye Standard?

Like all expert testimony, CSAAS must meet the requirements of Rule 702, 703, and 403, Ariz. R. Evid. That is, it must 1) assist the trier of fact to understand a fact in issue, 2) assist the trier of fact to understand evidence from a person qualified by knowledge, education or training, and 3) have probative value that outweighs its prejudicial effect.

However, before expert opinion testimony based on a novel scientific principle can be admitted, the rule of Frye v. United States requires that the theory relied on is in conformity with generally accepted explanatory theories. The purpose of this requirement is to assure the reliability of the testimony. Our Arizona appellate courts have noted that trial courts should be particularly cautious in admitting "science" testimony since there is a substantial risk juries give it undue weight.

Research does not disclose an Arizona case that has ruled on this precise issue. However, California has, in the context of "rape-trauma" evidence in People v. Bledsoe, 36 Cal.3d 236, 203 Cal. Rptr. 450, 681 P.2d 291 (1984) and CSAAS in People v. Bowker, 249 Cal. Rptr. 886, 203 Cal. App.3d 391, 681 P.2d 291 (1988). California appellate courts have held that this type of testimony is inadmissible under Frye for the purposes for which the prosecution sought to use it.[3] Specifically, California has found that Frye precludes an expert from testifying based on CSAAS that a particular victim's report of alleged molestation is credible because it fits the characteristics of the syndrome. That is, CSAAS is absolutely barred as being used as testimony to predict whether there has been a molestation.

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Further, California courts have opined that even general testimony describing the elements of the CSAAS in a way that allows the jury to apply the syndrome to the facts of the case is impermissible. It simply is too unfair and allows the jury to needlessly speculate about the facts of the case before it.

2. Testimony Only Allowed For Limited Purpose

California courts, however, will allow CSAAS testimony in rebuttal for a narrow purpose. For example, where a child delays reporting and the accused injects into the case that fact as a defense, an expert may testify that delayed reporting is not inconsistent with the secretive environment created by an abuser that occupies a position of trust. However, the expert is not permitted to describe the whole syndrome in general terms. It is only allowed to rebut the specific area under contention.

JURY INSTRUCTION REQUIRED WHEN STATE INTRODUCES ANY CSAAS TESTIMONY

Moreover, California courts hold that if the prosecution on rebuttal does introduce CSAAS testimony, the jury must be instructed that the expert's testimony is not intended and should not be used to determine whether the alleged victim's molestation claim is true. The jurors must understand that CSAAS research approaches the issue from a perspective opposite to that of the jury. CSAAS assumes that a molestation has occurred and describes a child's reaction to it. In California, CSAAS evidence is only admissible for the purpose of showing that the alleged victim's reactions, as introduced in evidence, are not inconsistent with a molestation having occurred. The approved California jury instruction is as follows:

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

CALCIC 10.64: CAUTIONARY INSTRUCTION--CHILD ABUSE/RAPE-TRAUMA SYNDROME (Penal Code 261,288)

"A witness has given testimony relating to the [child sexual abuse accommodation] [rape-trauma] syndrome. This evidence is not received and must not be considered by you as proof that the alleged victim's [molestation] [rape] claim is true. [Child sexual abuse accommodation] [Rape-trauma] syndrome research is based upon an approach that is completely different from that which you must take to this case. The syndrome research begins with the assumption that a [molestation] [rape] has occurred, and seeks to describe and explain common reactions of [child] [females] to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt. Thus, you may consider the evidence concerning the syndrome and its effect only for the limited purpose of showing, if it does, that the alleged victim's reactions, as demonstrated by the evidence, are not inconsistent with [him] [her] having been [molested] [raped].

Conclusion

Use of CSAAS testimony has been misused. Because of its potential to mislead the jury and unfairly prejudice our clients, it should not be allowed in the prosecution's case-in-chief. Attacking it on the ground of Frye, its relevancy and its unfair prejudicial value is appropriate. Also, attorneys should challenge the qualifications of the expert presenting the testimony.

If allowed, CSAAS testimony should only be for rebuttal and then only for the specific issue that has been raised and not a general discourse. If allowed, a limiting instruction should be requested so that the jury is not confused about the assumptions of CSAAS. **CJ^**

Endnotes:

1. Usually the state's so-called expert is Robert Emerick, Program Director for Phoenix Memorial Hospital Sexuality & Addiction Program. Emerick, who is not a physician or a psychologist, has a Masters of Education from U of A and is married to the head of the Maricopa County Attorney's Sex Crimes Unit. Defense counsel should object to his qualification and possible conflict of interest.

2. See Summit, The Child Abuse Sexual Abuse Accommodation Syndrome, 7 Int'l. J. of Child Abuse & Neglect 177 (1983); see also, Comment, The Admissibility of "Child Sexual Abuse Accommodation Syndrome" in California Courts, 17 Pacific L.J. 1361 (1986).

3. Numerous California appellate decisions have applied Bledsoe to CSAAS. In Bowker, the court listed some of those cases. Cases addressing similar expert testimony in molestation cases are State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986) and State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986).

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Editor's Note: Besides a pretrial motion to suppress CSAAS testimony, practitioners may also want to consider some other motions based upon the following cases:

* Motion to Preclude Testimony of Child Molester Profile
See U.S. v. Gillespie, 852 F.2d 475 (1988);

* Motion to Limit Prosecutor's Opening Statement
See U.S. v. Brockington, 849 F.2d 872 (1988);

* Motion to Prohibit Prosecutor From Talking With Child After She Is Sworn
See Perry v. Leeke, 488 U.S. _____ (102 L.Ed.2d 624 (1989));

* Motion to Prohibit Jurors From Viewing Videotape Alone In Deliberations
See U.S. v. Binder, 769 F.2d 595 (1985);

* Motion to Refer to Witness as Alleged Victim.

Victims' Rights Issues Continue to Affect Clients' Rights to a Fair Trial

Legislative Developments

This year the legislature is making modifications to last year's Victims' Rights Implementation Act (VRIA). The amendments are contained in House Bill 2262. The majority of the changes are at the request of the Arizona Prosecuting Attorneys' Advisory Council (APAAC), the Attorney General's Office and the Maricopa County Attorney's Office. Most changes are technical amendments to make complying with notice provisions easier.

The Act's sponsor, Representative Patti Noland, however, has suggested a major amendment that would limit the benefits of the VRIA to felonies, sexual offenses and misdemeanors where there is physical injury. The senate will hear the bill in the next few weeks.

This office also suggested that law enforcement officers be excluded from the provisions of A.R.S. 13-4433 (victims' refusal to interview) and that specific time limits for transmitting an interview request to an alleged victim be placed into the statute. Additionally, an amendment was proposed to make it clear that the alleged victim could contact this office, waive their right to have a county attorney present for an interview, and speak directly with defense counsel.

Special Actions

A planned special action by the Coconino County Public Defender's Office on the issue of preventing a defense interview of law enforcement personnel was derailed when the prosecutor changed his mind and encouraged the police officers to submit to defense interviews. The accused in that case allegedly threatened four police officers with a knife. While being taken into custody, one officer's leg was cut. The prosecutor took the position that all of the officers were victims and hence need not submit to interviews pursuant to the Arizona Constitution, A.R.S. 13-4433 and Rule 39. The accused's defense was insanity and defense counsel, Mikkel Jordahl, argued in a motion for deposition of the officers that the refusal violated due process rights of reciprocal discovery required by Wardius v. Oregon, 412 U.S. 470 (1973). The motion was denied and the special action would have been the next step in the case.

This office filed a special action on March 5th in a case where an alleged victim agreed to an interview and then changed his mind, apparently in response to additional comments made to the victim about defense counsel's demeanor and after being informed that the interview would be used as impeachment. The trial court originally agreed to an evidentiary hearing on the matter, however, later reversed itself, leading to the special action. Although the trial court was concerned about the actions of the prosecution, it found that A.R.S. 13-4433, as well as other provisions of the Victims' Bill of Rights, precluded it from forcing the alleged victim to testify at an evidentiary hearing on the issue of the prosecutor's conduct. The special action, argues among other issues, that an evidentiary hearing on this issue is not a defense interview within the scope of A.R.S. 13-4433, that failure to grant a hearing violates the accused's right to counsel and that the court must closely scrutinize the actions of the state and provisions of A.R.S. 13-4433 since it infringes upon free speech.

Additionally, it is absolutely improper for either party in a criminal case to interfere with access to witnesses. Numerous cases have held that defense counsel has the right to talk to witnesses. Courts base this on the right to counsel, due process of law and ethical considerations.

The court of appeals will decide whether to accept jurisdiction on March 30th. The special action was filed by Christopher Johns and Jeffrey Victor.

Motions

In a DUI trial before Judge Gottsfield, the prosecution argued that a witness that was also involved in a collision with the accused was a victim and hence exempt from a pretrial interview. Mark Berardoni, of Trial Group D, filed and argued a motion opposing the prosecutor's position. The trial court found that the witness was in fact not a victim and an interview was conducted.

Issues

Previous newsletter articles have extensively discussed the due process and First Amendment implications of the Victims' Bill of Rights, the VRIA and Rule 39, however, practitioners should also keep in mind the confrontation clause of the Sixth Amendment.

In Smith v. Illinois, 390 U.S. 129 (1968), a case where the accused was denied the opportunity to discover the true name or address of a principle witness, the court held that the confrontation clause was violated. The court wrote that:

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"[W]hen the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness's name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

Id. at 131.

While Smith v. Illinois does not establish an absolute right to have a jury hear a witness's true name and address, when relevant to the defense, limiting cross-examination may deny a client effective assistance of counsel. The VRIA and Rule 39 appear to prohibit defense counsel from eliciting what Smith v. Illinois permits -- complete cross-examination of the witnesses against the accused.

Later federal cases have held that trial judges do have the latitude to impose reasonable limits on cross-examination when there are concerns such as harassment, prejudice, confusion of the issues or the witness's safety. Questions tending to endanger the personal safety of a witness also go beyond the bounds of cross-examination. The personal safety issue almost always involves informants. See e.g., U.S. v. Washington, 797 F.2d 1461 (9th Cir. 1986). **CJ ^**

Student-Extern Program

By Gary Kula

It only took the nine-member jury a little over four minutes to come back with a guilty verdict. It's little wonder, however, once you consider that the two key defense witnesses were Mark Berardoni (Trial Group D) and Rena Glitsos (Trial Group D) and the defendant was Jim Wilson (Trial Group D). Such was the mock trial put on by our student externs. Judge Malcolm P. Strohson of the City of Phoenix Municipal Court and Edna Grossberg, court reporter, were also on hand to lend a sense of realism to the script.

The mock trial was used to prepare our student externs for their first jury trials which are set for late March and early April. The five student externs are John Brisson, Patrick Burwell, Pat Ramirez, Mary Shirley and Ernesto Quesada. They have been covering the misdemeanor DUI calendar in six justice courts as part of their exposure to the criminal justice system and the role of a public defender.

As part of their training, the student externs are requested to attend a weekly group meeting at ASU. Volunteer guest speakers are needed for these meetings to share their experiences or to lecture on an aspect of trial advocacy. Christopher Johns, for example, opened the semester with an introduction to the Public Defender's Office. Mike Walz recently came to ASU to lecture on cross-examination techniques. The student externs would benefit from hearing different view points from different individuals on case preparation and presentation. They have already heard all my stories -- several times! Please contact me if you are interested. ^

Work Release

By Gary Kula

Work furlough is not for everyone. In some situations, your client may be much more appropriate for the work release program. In those situations where your client is not accepted into work furlough, then work release is your client's only other option.

If you look back at our previous discussion of the work furlough program (November 1991), you will see that there are a number of restrictions on participation in that program. To be accepted into the work furlough program, the client's background, the nature of his employment, payment method and work location are all scrutinized. If after considering this criteria, it is determined that your client is not appropriate, your client's only choices are not working or the work release program.

The title, work release program, is a misnomer as it is not really a program at all. It is a court-authorized, restricted release from jail for purposes of employment. There is no application process. The decision as to placement in the work release program rests solely within the discretion of the sentencing judge. If the judge accepts sworn testimony, the avowals of counsel or other documentation in granting work release, the order of confinement must make a specific reference to work release. The order must also designate those days of the week when the defendant may work. It must also specify the time your client should be released from jail and the time he must return at the end of the work day. There are no restrictions on the number of days per week or number of hours per day a client can work as long as it is documented in the confinement order.

If your client changes his work schedule, the matter must be brought before the court for modification of the earlier order. If the order of confinement does not specifically state the release or termination date for the end of the sentence, your client will receive two-for-one credit. One exception to this rule is where a client is given a mandatory sentence, for example, a second DUI conviction within five years. This time will be served flat if the order of confinement states that the sentence is the result of a prior conviction even if no release date is indicated.

The work release program offers several advantages to our clients. The major advantage is that it allows clients who are not accepted into the work furlough program to continue in their employment. For clients who only want to be released for part-time jobs or who have families to support, the fact that there is no fee (versus $8.50/day, $255/month for work furlough) for participation makes a significant difference.

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Since work release lacks the structure and supervision of the work furlough program, courts and prosecutors have been, at times, reluctant to agree to it. Unlike work furlough, work release is based in part on a honor system. There is no on-site surveillance of work release participants. This concern may be alleviated, however, by a court-ordered requirement that the participant present documentation in the form of either pay stubs or work invoices to the court or their probation officer on a regular basis. Concerns have also been expressed as to substance abuse. It should be noted that even though work release is not run through the probation office, participants in the program are subject to the same rules and regulations as the general jail population. Participants in the program are subjected to random intoxilyzer testing. If a participant reports to the jail under the influence of drugs or alcohol, or refuses to submit to an intoxilyzer test, they will be removed from work release. This measure, removal from the program, also applies to a participant who on two occasions is late in reporting back to the jail at the end of the work day. If removed from work release, the client is transferred to general population and may be denied two-for-one credit, both accrued and prospective.

Participants in the work release are housed in the Estrella Jail. The only items they can bring into the jail are a padlock, two sealed packs of cigarettes (per day), one magazine or soft cover book, religious reading material and one non-electrical alarm clock. Participants may not bring in any extra clothing other than the civilian clothes they are wearing when they return to the jail. The participants are searched upon their return to jail at the end of each work day and are also subject to search at any time. For items such as money, keys, wallets and sunglasses, each participant is provided with a small storage locker.

As defense attorneys, it is important that we explore all options which best suit the interests of our clients. If you determine that work furlough is inconsistent with your client's best interests, or if it is determined that your client is not acceptable for work furlough, the work release option should be considered and aggressively pursued. ^

PRACTICE TIPS:

Brady Material

In view of recent cases on discovery and current victims' rights legislation, making sure that you specifically request the criminal history of alleged victims may be imperative for a 609 hearing and trial cross-examination.

Client Appearance

Trial practice is about creating a reality for the jury. How our clients present themselves is often very important. Looking guilty does not help the cause. What if your client has tattoos? Small tattoos on arms can be covered with Band-Aids. However, some clients also have facial tattoos as well. One defense attorney in the office has found that you can buy stick make-up at most drug stores or discount department stores. This works well at covering up tear drops or other common facial tattoos.

Dozing During Trial

Don't stay up too late before trial. The Ninth Circuit Court of Appeals in a habeas case has held that mere physical presence of an attorney does not fulfill Sixth Amendment entitlement to assistance of counsel. In Javor v. U.S., 724 F.2d 831 (1984), the court held that prejudice is inherent because an unconscious or sleeping counsel is equivalent to no counsel at all.

The court found that the accused's attorney slept during some testimony and asked another defendant's attorney if he missed anything relating to his own client. The trial judge also noted that the accused's attorney was often "dozing" and that other attorneys "nudged" and "kicked" him to wake him up.

DUI

Is the officer that performed the HGN test really qualified to give it? State v. Blake, 718 P.2d 171 (1986), allows HGN evidence for limited purposes in a DUI trial. However, the prosecution must still have the proper foundation for an officer to testify. The officer must be ALEOAC certified, maintain an 80% accuracy rate, show that the technique was properly used and that the results were properly recorded. The officer may only testify to his opinion, that based on his training and experience, the accused's performance showed possible neurological dysfunction. One cause of the dysfunction could be alcohol ingestion.

Morning Calendar

Under the heading "stranger than fiction", a recent U.S. Supreme Court decision may give trial courts additional power over morning calendars. In Mireles v. Waco, _____ U.S. _____ (1991), Howard Waco (true name), a Los Angeles public defender, sued Raymond Mireles a superior court judge and two police officers. The suit arose when Judge Mireles, angered by the fact that there were no public defenders in his courtroom when morning calendar began, ordered two police officers to "forcibly and with excessive force" seize Waco and bring him to his courtroom.

Waco was violently dragged into the courtroom and a lawsuit under 42 U.S.C. 1983 followed. The district court granted Judge Mireles' motion to dismiss on the grounds of judicial immunity. The Ninth Circuit reversed, since excessive force was used and hence the judge was not acting in his official capacity.

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The Supreme Court granted certiorari and held pursuant to Stump v. Starkman, 435 U.S. 349 (1978), that the focus of inquiry should be the nature of the act and not the act itself. A judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge. Consequently, the judge is entitled to immunity. ^

Editor's Note: If you have a "Practice Tip" to share with other defense counsel, please forward to Christopher Johns.

TRAINING CALENDAR

March 27 - 28

The Colorado Criminal Defense Bar and the University of Colorado School of Law presents "Trial Practice Institute" in Boulder, Colorado.

April 09 - 11

The National Legal Aid & Defender Association presents "Appellate Defender Training" in Nashville, Tennessee.

April 10

The Maricopa County Public Defender's Office presents "Cross-Examination: The Look Good Cross" from 9:30 a.m. until 4:30 p.m. in the Maricopa County Board of Supervisors' Auditorium. Terry Mac Carthy, nationally known criminal defense attorney (Federal Public Defender) and lecturer will be the featured speaker.

April 23 - 25

The American Bar Association, Appellate Judges Conference and Section of Litigation present "The 8th Appellate Practice Institute" in Chicago, Illinois.

April 24 - May 02

The Institute for Criminal Defense Advocacy presents "Trial Skills Academy 1992" in San Diego, California.

April 30 - May 02

The American Bar Association Center on Children and the Law presents "The ABA Sixth National Conference on Children and the Law" in Arlington, Virginia.

May 14 - 16

The National Legal Aid and Defender Association presents "Defender Management Training Conference -- 1992" in Albuquerque, New Mexico.

May 9th

AACJ presents "5th Annual Seminar on Aggressive Defense of the Accused Impaired Driver" in Tucson.

June

The Maricopa County Public Defender's Office presents "Ethics and the Criminal Lawyer". Location and faculty to be announced. ^

ARIZONA ADVANCED REPORTS

Volume 101

State v. Greenway
101 Ariz. Adv. Rep. 7, December 3, 1991 (S.Ct.)

Defendant was convicted of two counts of first degree murder, involving the robbery, rape and torture of one victim. Defendant argues that Arizona's death penalty statute is unconstitutional because the judge, not the jury, decides the existence of aggravating and mitigating factors. The aggravating factor of especially heinous, cruel or depraved is arbitrary. Once the state proves one or more aggravating factors, death is presumed the proper sentence. These same arguments were recently rejected by the United States Supreme Court in Walton v. Arizona, 110 S.Ct. 3047 (1990). The Arizona Supreme Court has previously rejected these arguments in State v. Vickers, 159 Ariz. 532 (1989). Defendant claims that the trial court should have found in mitigation that death by lethal gas is cruel and unusual punishment. This claim has previously been rejected in State v. Williams, 166 Ariz. 132 (1987).

The same judge presided over both the defendant and his co-defendant's trial. At the co-defendant's trial, statements implicating the defendant were admitted, including that defendant killed the victims because they had seen his face. Defendant argues that the trial judge could not possibly ignore this information at sentencing. The evidence presented at trial and at the sentencing hearing allowed the trial judge to find the aggravating factors without relying on the testimony received at co-defendant's trial. Further, the statements admitted at co-defendant's trial were also admitted at the defendant's sentencing hearing to rebut the defendant's mitigating evidence. These statements were admitted only for rebuttal and not to establish any of the aggravating factors. Absent proof to the contrary, trial judges in capital cases are presumed capable of focusing on the relevant sentencing factors. No error occurred.

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Defendant claims that the trial judge should have recused himself after presiding at the co-defendant's trial and reading a biased pre-sentence report. There is no per se disqualification of a judge who presides over a co-defendant's trial. A judge shall not be removed absent a showing of bias or prejudice. The pre-sentence report contained victim impact statements, which were held inadmissible at capital sentencing hearings in Booth v. Maryland, 482 U.S. 496 (1987). However, the United States Supreme Court recently overruled Booth in Payne v. Tennessee, 111 S.Ct. 2597 (1991). Booth is also inapplicable in Arizona because the judge, not the jury, determines the sentence. Finally, the judge considered the pre-sentence report only as to the other counts and not on the murder convictions.

In an independent review of the aggravating factors, the court finds that pecuniary gain was a proper aggravating factor. The defendant's desire for pecuniary gain permeated his entire conduct and the murders were part of the overall scheme of the robbery. Defendant claims that considering pecuniary gain constitutes double punishment because it is a part of the robbery. To prove robbery, the state must show a taking. To prove pecuniary gain, the state must show motivation. The facts necessary to prove a taking are not the same necessary to prove the motive for murder.

Defendant claims that the court's finding that the murders were especially heinous, cruel or depraved was contrary to the evidence. A crime is especially cruel when the defendant inflicts mental anguish or physical abuse before the victim's death. Here, one victim was shot in the leg, and some time later, both victims were killed execution style proving mental distress and psychological terror. Depravity focuses on the defendant's mental state and attitude, as shown by his words and actions. These victims were helpless and the defendant relished the murders. Defendant's later indifference and bragging support a finding that he relished the murders. A murder may be especially depraved when a defendant kills to eliminate a witness.

The trial judge also found that the defendant had been convicted of one or more homicides as an aggravating factor. The trial judge found that this factor applied to both counts. Defendant argues that finding this factor as to each count amounts to double punishment. The plain meaning of the statute reads that if defendant has been convicted of one or more other homicides and this conviction arose out of the commission of the offense, the homicide conviction is an aggravating factor. The statute allows consideration of the death penalty under the egregious circumstance of multiple first degree murders.

In reviewing the mitigating factors, the trial court properly found that defendant's age [19] was a mitigating factor. Defendant's I.Q. of 72 shows that he is borderline functional but not mentally retarded. While the co-defendant's life sentence can be a mitigating factor, it is not in this case.

The court also finds that the death penalty in this case satisfies Enmund v. Florida, 458 U.S. 782 (1982) where the defendant killed, attempted to kill or intended to kill. While the jury's general verdict on both felony and premeditated murder theories does not satisfy Enmund, the sentencing judge found major personal involvement that he fired the fatal shots and showed reckless indifference. The court also finds this sentence proportional to other similar cases.

State v. Cook
101 Ariz. Adv. Rep. 20, December 5, 1991 (S.Ct.)

Defendant was convicted of two counts of first degree murder and sentenced to death. At trial, defendant represented himself with advisory counsel. Defendant claims he was unconstitutionally permitted to represent himself. The record demonstrates that defendant was intellectually competent, understood the trial process and was capable of making rational decisions. This is all the competence that is required.

Defendant claims the trial court denied him hybrid representation; representation both by himself and by counsel. Arizona does not recognize a right to hybrid representation.

Defendant claims that the judge unduly limited the participation of his advisory counsel when he expressed concern that counsel was offering unsolicited advice. No error occurred because the defendant explained that the advice was consistent with previous arrangements. Defendant claims that he was denied lay assistance where the trial judge refused to allow a fellow prisoner to act as investigator. The trial judge determined that defendant wanted his fellow prison to serve as advisory counsel and correctly ruled that this person was without authority to render legal assistance.

Before trial, the state informed the defense that the state would proceed at trial to prove a culpable mental state of knowing, and not intentional first degree murder. The state simultaneously moved to preclude evidence of defendant's intoxication. Defendant argues that the trial court erred in allowing the state to convict him of first degree murder under a mental state of knowingly and that the court's ruling wrongful denied him the opportunity to pursue the defense of voluntary intoxication at trial. Under the statute, a person may be guilty of first degree murder by causing the death of another with premeditation, either intentionally or knowingly. When asked if defendant objected to an order precluding evidence of intoxication, defendant replied that he had none. Defendant did not later request the trial court to instruct the jury on voluntary intoxication and waived any claim of error.

Defendant also claims it was error to preclude a voluntary intoxication defense because he was charged under an accomplice liability theory which requires the state to prove that a defendant acts with the intent to promote or facility the commission of an offense under A.R.S. Section 13-301. Defendant failed to object to the judge's jury instruction on accomplice liability and waived the error.

Defendant also claims that he was precluded from raising intoxication as a mitigating factor. The judge's order at trial precluding evidence of intoxication applied only to trial and in no way precluded Cook from establishing intoxication as a mitigating factor at sentencing.

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During closing arguments, the prosecutor commented on the defendant's conversations with his legal advisor and that the defendant was covering up things. Defendant failed to object and waived any error absent fundamental error. The prosecutor's comments regarding conversations with advisory counsel did not implicate defendant's failure to testify. The prosecutor's comment was not directed at the fact that defendant did not testify. The prosecutor's comments regarding defendant covering up were part of a rhetorical argument suggesting that defendant had tried to cover up his participation in the murder and did not improperly refer to the defendant's silence.

At trial, defendant asked the police officer why his interview had not been recorded. The officer replied that defendant invoked his right to remain silent and terminated the interview. Defendant objected and moved for a mistrial because the officer referred to his invocation of his right to remain silent. When the prosecutor later referred to the officer's testimony that defendant terminated the interview, defendant again objected. Any error occasioned by these comments was invited by the defendant's question.

During the trial, the prosecutor learned that one juror was talking to co-workers about the trial. The prosecutor called the juror's co-workers and heard that the juror was making comments critical of the state's case. The prosecutor called the matter to the judge's attention and moved to dismiss the juror for cause. In chambers, the juror admitted criticizing the prosecution, but denied discussing trial testimony. The judge excused the juror for disobeying the admonitions. The trial judge did not abuse his discretion. While the circumstances were irregular, it was reasonable to determine that the juror's ability to render a fair and impartial verdict had become suspect. The lack of error does not excuse the prosecutor's conduct. The appropriate procedure is to inform the court of the potential juror misconduct and let the court conduct any necessary investigation. The prosecutor alienated the juror and made himself a witness in the case.

Defendant claims the trial judge erred in denying continuances to secure the testimony of two witnesses. No abuse of discretion has been shown. One witness would have testified about the co-defendant's past. The co-defendant testified at trial and admitted all the things the witness would say. The trial judge properly found that this witnesses's testimony would have been cumulative. The other witness would have testified to the character of the co-defendant and the victims. This witness could not be located at the time of trial. The trial judge denied the continuance but did not rule out reopening the defense. Defendant did not inform the court if the witness had been located. Defendant has failed to show prejudice as the co-defendant admitted all the factors defendant stated he intended to prove through the unavailable witness. No abuse of discretion appears.

At his initial appearance, defendant made an inculpatory comment before his attorney appeared. Defendant moved to suppress this statement under Edwards v. Arizona, 451 U.S. 477 (1981). While the defendant was in custody at the time of his statement, he was not being interrogated. Defendant also claims that his statement about preferring the death penalty was irrelevant. The statement would not be relevant if offered to suggest that the defendant faced the death penalty if convicted. However, the statement could be interpreted as evidence of the defendant's guilty mind. No abuse of discretion occurred.

Prior to trial, the co-defendant pled guilty in exchange for a conviction of second degree murder. Co-defendant's plea agreement required him to testify against the defendant. The agreement also specified that any inconsistent statements would violate the agreement. Such an agreement may improperly coerce a witness into false consistent statements. The ethical problems of such agreements had already been noted in State v. Fisher, 141 Ariz. 227 (1984). Defendant did not object to his co-defendant's testimony on these grounds at trial. The appropriate remedy at this point is to petition for post-conviction relief and conduct an evidentiary hearing to determine if the co-defendant's testimony was coerced.

Defendant claims that the trial judge failed to instruct the jury on the lesser included offense of second degree murder. Defendant notes that his co-defendant was permitted to plead to second degree murder. The trial judge correctly rules that there was no evidence to find that these murders were committed without premeditation. As to the co-defendant's plea, the fact that the judge accepted a plea to a charge that did not include premeditation is irrelevant. The evidence at trial supported only verdicts of guilty of premeditated murder or not guilty.

At sentencing, the judge found the murders cruel, heinous and depraved. There is no doubt from the facts that the victims suffered greatly and the murders were cruel. While defendant did not personally complete one murder, he cruelly assisted in the killing. Both murders were also heinous and depraved.

The trial judge found that the murders were committed for pecuniary gain. One murder was committed after the victim discovered the theft and tried to escape. He was also searched to see if he had anything else defendant could steal.

The trial judge also found that defendant had been convicted of other homicides committed during the same offense. The prosecutor did not raise this factor prior to the aggravation/mitigation hearing. While notice of an aggravating factor is required, defendant did not object. There was no prejudice to the defendant. The murders were committed during a continuous course of criminal conduct and were sufficiently related to establish this aggravating factor.

In mitigation, defendant claimed his intoxication and mental history. Defendant failed to present evidence of his intoxication. The judge's pretrial ruling that intoxication was not relevant to knowing first degree murder did not prevent the defendant from raising this as a mitigating factor. The trial judge found the intoxication evidence presented insufficient to require mitigation. The trial judge also found defendant's prior mental problems unconnected to the offense and insufficient to call for mitigation.

The defendant also noted the disparity between his death sentence and his co-defendant's sentence of twenty years flat. Disparity in sentences is a relevant factor in weighing the appropriateness of the death penalty. However, these sentences are not disproportionate enough to outweigh the aggravating factors present. The egregious nature of these murders also makes the sentences proportional to other cases.

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Defendant also claims the death penalty statute is unconstitutional because the statute is vague and the sentencing procedures create a presumption or mandate of the death penalty. The United States Supreme Court recently rejected these arguments in Walton v. Arizona, 110 S.Ct. 3047 (1990).

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State v. Slemmer
102 Ariz. Adv. Rep. 11, December 19, 1991 (S.Ct.)

Defendant was convicted of assault with intent to commit murder in 1977. The jury was instructed that defendant's evidence of self-defense required that the jury find the defendant not guilty if three conditions were met. The trial judge refused an instruction that said, "If the evidence of self-defense raises any reasonable doubt as to whether defendant was justified in shooting the victim, then the jury must find the defendant not guilty." Slemmer's conviction and sentence were affirmed on appeal in 1978.

Ten years later, defendant filed a petition for post-conviction relief based upon State v. Hunter, 142 Ariz. 88 (1984). The instruction given at the 1977 trial had the same potential for misleading the jury as found in Hunter and State v. Duarte, 165 Ariz. 230 (1990). This instruction was fundamental and not harmless error.

The State maintained that the defendant was precluded by his previous appeal. Preclusion does not apply when there has been a significant change in the law and there are sufficient reasons to allow retroactive application. In a lengthy discussion of retroactivity, the court notes that retroactive effect is appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials and where the standard goes to the heart of the truth-finding function. The Supreme Court adopts federal retroactivity analysis for state constitutional questions applying those federal standards. The Hunter principle requires retroactivity only to cases not final at the time Hunter was decided. Cases final before Hunter are not affected. Post-conviction relief is denied. The Supreme Court also disapproves the contrary holding of State v. Garcia, 152 Ariz. 245.

State v. Stevenson
102 Ariz. Adv. Rep. 24, December 17, 1991 (Div. 1)

Defendant, charged with sale of narcotic drugs, pleads guilty to conspiracy to sell a narcotic drug. On appeal, defendant challenges the factual basis for his plea. The only factual basis for the plea was defendant's admission that he sold rock cocaine to an undercover narcotics agent. A conspiracy does not exist unless there is an agreement between two or more persons to commit the crime and an overt act is taken in furtherance of the agreement, an act which advances the conspiracy. This presupposes that the conspirators have agreed to commit a specific crime. It does not encompass a situation where a defendant sells contraband on request with no preliminary discussions. There was no factual basis in this case for conspiracy. [Presented on appeal by James R. Rummage, MCPD.]

FEBRUARY JURY TRIALS

January 14

Dan Lowrance: Client charged with aggravated assault, armed robbery, sexual assault and kidnapping (all while on probation). Trial before Judge Schneider ended with a hung jury on all counts February 06. Prosecutor D. Heilman.

January 28

George G. Gaziano: Client charged with child molestation. Trial before Judge Hendrix ended with a hung jury February 06. Prosecutor D. Macias.

February 04

Gary F. Forsyth: Client charged with theft. Trial before Judge Seidel ended February 06. Defendant found guilty. Prosecutor L. Schroeder-Nanko.

James J. Haas: Client charged with theft. Trial before Judge Dann ended February 07. Defendant found not guilty. Prosecutor T. Doran.

Suzette I. Pintard: Client charged with aggravated DUI. Trial before Judge Myers ended February 06. Defendant found guilty. Prosecutor M. Rand.

Emmet J. Ronan: Client charged with kidnapping and sexual assault. Trial before Commissioner Jones ended in a mistrial February 06. Prosecutor V. Imbordino.

Jeffrey A. Williams: Client charged with possession of narcotic drugs (with two priors). Trial before Judge Hilliard ended February 07. Defendant found not guilty. Prosecutor P. Davidon.

February 06

Robert W. Doyle: Client charged with burglary and theft. Trial before Judge Schneider ended in a mistrial February 14. Prosecutor L. Ruiz.

February 11

Dan Lowrance: Client charged with DUI. Trial before Judge Dann ended February 20. Defendant found guilty. Prosecutor J. Burkholder.

Wesley E. Peterson: Client charged with three counts sexual assault. Trial before Judge Sheldon ended February 13. Defendant found not guilty. Prosecutor A. Williams.

February 12

Shelley T. Davis and Russell G. Born: Client charged with child molestation. Trial before Judge Hilliard ended February 21. Defendant found not guilty. Prosecutor L. Reckart.

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Randall V. Reece and Linda K. Williamson: Client charged with sexual assault and robbery. Trial before Judge Hertzberg ended February 23. Defendant found guilty of sexual assault and not guilty of robbery. Prosecutor J. Rizer.

February 13

Larry Grant: Client charged with possession of narcotic drugs. Trial before Commissioner Jones ended February 27. Defendant found guilty of lesser-included offense. Prosecutor V. Kratovil.

Douglas K. Harmon: Client charged with four counts child molestation, three counts sexual conduct with a minor and two counts public sexual indecency. Trial before Judge Sheldon ended February 20. Defendant found guilty. Prosecutor D. Macias.

Timothy J. Ryan: Client charged with aggravated DUI. Trial before Judge Grounds ended February 18. Defendant found guilty. Prosecutor T. Glow.

February 19

Robert C. Billar: Client charged with aggravated DUI. Trial before Judge Gottsfield ended with a hung jury (5 to 3) February 21. Prosecutor H. Schwartz.

James J. Haas: Client charged with sale of narcotic drugs. Trial before Judge Dann ended February 24. Defendant found guilty. Prosecutor C. Richards.

Stephen M.R. Rempe: Client charged with sexual assault, kidnapping and sexual abuse. Trial before Judge Dougherty ended March 04. Defendant found not guilty of sexual assault and kidnapping; guilty of sexual abuse. Prosecutor K. Maricle.

February 20

Elizabeth S. Langford: Client charged with aggravated DUI and unlawful flight. Trial before Judge Grounds ended February 28. Defendant found guilty. Prosecutor N. Miller.

Wesley E. Peterson: Client charged with aggravated assault and kidnapping (dangerous) while on parole. Trial before Judge Hendrix ended in a mistrial February 25. Prosecutor J. Martinez. NOTE: Retried February 26. Defendant found guilty on February 28.

February 24

Robert C. Corbitt: Client charged with DUI and possession of drug paraphernalia. Trial before Judge Sheldon ended February 26. Defendant found guilty of DUI and not guilty of possession of drug paraphernalia. Prosecutor J. Beatty.

Andrew J. DeFusco: Client charged with aggravated DUI. Trial before Judge Grounds ended February 28. Defendant found guilty. Prosecutor K. Mills.

Gary J. Hochsprung: Client charged with possession of narcotic drugs for sale. Trial before Judge D'Angelo ended with a hung jury February 25. Prosecutor McVey.

Paul J. Prato: Client charged with burglary in the 3rd degree (with priors). Trial before Judge Pro Tempore Sproull ended February 26. Defendant found guilty (also guilty on priors). Prosecutor J. Kaites.

Joseph A. Stazzone: Client charged with custodial interference (with priors). Trial before Judge Ryan ended February 27. Defendant found guilty (priors dismissed). Prosecutor D. Bash.

February 25

Kimberly A. O'Connor: Client charged with misconduct involving weapons. Trial before Judge Galati ended February 26. Defendant found guilty. Prosecutor A. Massis. ^

PERSONNEL PROFILES

On March 02, Gary Forsyth switched places with Jim Likos. Gary is now in our Appeals Division and Jim is in Trial Group D.

On March 16, Stephanie Sumares and Joyce Bowman of Pretrial Services traded places. Stephanie is now in our downtown office and Joyce is working out of the Durango facility.

On Friday, June 26, Bob Doyle of Trial Group D will speak at the Arizona State Bar Convention in Tucson. Bob will make a half-hour presentation on disciplinary proceedings as part of the public lawyers' "Ethics" seminar. Bob, who has been with our office for a year, was asked to speak because of his participation with the State Bar as a volunteer bar counsel, a hearing committee member and his current role as a member of the Disciplinary Commission. ^

Public Defender's Office Speakers' Bureau

Our Speakers' Bureau is growing and has provided local groups and government agencies with informed speakers who have successfully presented the defense role in the criminal justice system and the defense perspective on current legislation or community trends.

The Bureau presently consists of the following members:

Carol Scott Berry	Robert E. Guzik
Russell G. Born	Christopher Johns
James P. Cleary	Thomas E. Klobas
Reginald L. Cooke	Gary Kula
Dennis W. Dairman	Daniel R. Raynak
David R. Fuller	Dean Trebesch
Larry Grant	Michael Walz

If anyone is interested in joining the Bureau or in scheduling a speaker for an event, please contact Georgia Bohm in our Training Division (506-8200). ^